

IN THE SUPREME COURT

STATE OF MICHIGAN

On Appeal from Michigan Court of Appeals

ALLAN PEDEN,

Plaintiff-Appellee,

vs.

**CITY OF DETROIT,
DETROIT POLICE DEPARTMENT**

Defendant-Appellant.

Supreme Court No.: 119408
Court of Appeals Docket No.: 214491

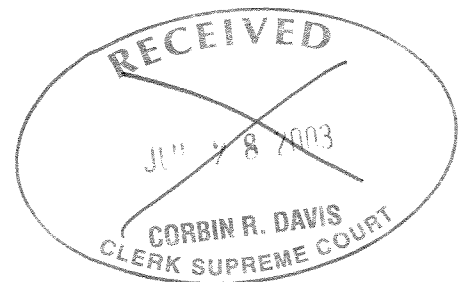
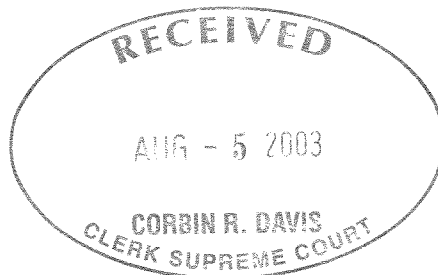
Wayne County Circuit Court
Case No.: 96-645449-CZ

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Plaintiff-Appellee filed a timely appeal to the Michigan Court of Appeals challenging the Circuit Court's Order granting Defendant-Appellant's Motion for Summary Disposition. On March 23, 2001, the Court of Appeals rendered a decision reversing the lower court's ruling and remanding the matter to Circuit Court for further proceedings. Defendant-Appellant moved for rehearing on April 13, 2001. This Motion was denied on May 16, 2001. Defendant-Appellant filed an Application for Leave to Appeal on June 6, 2001 pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2). The Michigan Supreme Court granted the application for leave and jurisdiction is therefore proper pursuant to MCR 7.301(A)(2).

QUESTIONS PRESENTED FOR REVIEW

- 1. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT PLAINTIFF-APPELLEE PRESENTED A GENUINE ISSUE OF FACT REGARDING THE ESSENTIAL FUNCTIONS OF HIS POLICE OFFICER POSITION WITH THE DETROIT POLICE DEPARTMENT?**

Plaintiff-Appellee would answer: "No"

Defendant-Appellant answer: "Yes"

Court of Appeals answered: "No"

- 2. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT PLAINTIFF-APPELLEE PRESENTED A GENUINE ISSUE OF FACT WITH RESPECT TO WHETHER HE COULD ACTUALLY PERFORM THE ESSENTIAL FUNCTIONS OF HIS POSITION AS A POLICE OFFICER WITH THE DETROIT POLICE DEPARTMENT?**

Plaintiff-Appellee would answer: "No"

Defendant-Appellant answer: "Yes"

Court of Appeals answered: "No"

INTRODUCTION

The Chief of Police of the Detroit Police Department terminated Allan Peden from his police officer position within the Department's Criminal Analysis Unit in 1996 pursuant to his authority under the Detroit City Charter to seek the non-duty disability retirement of a police officer who is unable to perform the essential functions of his position. The Plaintiff's heart condition precluded him from engaging in the physically strenuous aspects of police work, i.e., making a forcible arrest, as determined by the Department's doctors, as well as the Plaintiff's treating physician. As such, this case presents a novel issue of law, namely, as to what are the essential functions of a police officer. For the reasons more fully discussed below, the Court of Appeals' decision, which adopts the Plaintiff's position on the essential functions of the police officer position, runs counter to the established law, and equally important, the policies, rules and regulations of the Detroit Police Department and its ability to carry out the critical mission of law enforcement. For these reasons, Defendant Detroit Police Department respectfully requests that the Court reverse the Court of Appeals' decision and reinstate the lower court's decision.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Quoting the Detroit City Charter, then Chief of Police Isaiah McKinnon testified that the City of Detroit Police Department is "entrusted with the duty to preserve the public peace, prevent crime, arrest offenders, protect the rights of persons and property, guard the public health, preserve order, and enforce the laws of the state and the nation

and the ordinances of the city.” (Chief McKinnon First Affidavit at p. 1, App. at 68a)

Chief McKinnon testified further that:

In order for the Detroit Police Department to achieve its mission as mandated by the Charter both on a daily basis and in emergency situations, it is essential that the police department be composed of an adequate number of sworn members who are both physically and psychologically capable of performing the attached essential functions of a police officer as developed by the Detroit Police Department, such essential functions including the ability to make a forcible arrest, driving a motor vehicle under emergency conditions and qualifying with weapons.

All sworn members of the Detroit Police Department, regardless of assignment, are required to perform the essential functions of the positions of police officer.

In order to protect the public safety, sworn members of the department, regardless of their assignment, must be reassigned throughout the year to task forces providing protection to the public at such events as the Freedom Festival Fireworks and the Detroit Grand Prix and during Halloween and Halloween eve. In fact, the operation plans for these events are dependent upon the assignment of these officers. The inability to make such reassignments because of physical impairment of members substantially interferes with the effective provision of essential public safety services by the Detroit Police Department. (Id.)

At the time that this civil action was filed in 1996, the Detroit Police Department had approximately 4022 sworn members. (Chief McKinnon Second Affidavit at p. 3, App. at 78a) The Detroit Police Department has police officers who are assigned to one of thirteen precincts located throughout the city. It also has police officers who are assigned to 83 specialized units, which include Internal Affairs, Labor Relations and Crime Analysis Unit (“CAU”). Police officers can apply for “bidded for” positions within the specialized units and precincts, pursuant to the DPOA collective bargaining agreement. Only the Chief of Police, pursuant to the Detroit City Charter, is legally charged with the responsibility for administering the department, including the transfers

and deployment of personnel within the department. (Chief McKinnon, First Affidavit at p. 1, App. at 68a)

The Detroit Police Department operates under a collective bargaining agreement with the Detroit Police Officers Association ("DPOA"). (Id. at p. 3) Under the DPOA contract, every member has a permanent assignment to a precinct or specialized section. (Commander Falvo Dep. at p. 11, App. at 11a) The agreement also provides that the Department has the contractual right to "assign out" an officer from one command to another for a period which does not exceed eighty-four days. (Falvo Dep. at p. 14, Id at 12a)

All police officers are required to enforce all laws and perform the physical aspects of police work, which include being able to effectuate a forceful arrest or to chase criminals. The Department's Rules and Regulations, Section A, state that:

All members are responsible for enforcing all laws, ordinances, and police regulations impartially, objectively, and equally. The delegation of the enforcement of certain laws and ordinances to a particular unit of the department does not relieve members of other units from taking proper police action for violation coming to their attention. **Members of specialized units likewise are not relieved from enforcing all laws for which the department is responsible.** (Attachment to Chief McKinnon's First Affidavit, App. at 75a) (emphasis added)

The Department's Police Manual sets forth the responsibilities of persons who hold the title of "police officer":

16. POLICE OFFICER

A police officer shall be responsible for performing a variety of duties related to the protection of life and property, enforcement of criminal and traffic laws, prevention of crime, preservation of the public peace, and the apprehension of criminals. A police officer shall also be responsible for performing clerical duties as assigned by proper authority.

A police officer shall assume any other duties and responsibilities which may be delegated by a superior officer or which are set forth in department rules, regulations, orders or procedures. (App. at 79a)

The job description for the police officer position of the Detroit Police Department has been maintained since at least 1974. (App. at 83a) It sets forth the job duties of a Detroit police officer:

DUTIES STATEMENT: Under supervision, to patrol an assigned post to preserve law and order; and to perform related work as required.

TYPICAL EXAMPLES OF WORK PERFORMED: Subject to laws, ordinances, departmental rules and regulations and detailed instructions from superiors:

Patrolling an assigned post by investigating and reporting unusual or suspicious circumstances; **enforcing laws and ordinances**; issuing ordinance violations; **apprehending violators of law**; guarding prisoners in transit or under temporary confinement; investigating traffic accidents; transporting sick and injured persons to hospitals;... and serving warrants. (*Id.*) (emphasis added)

The Detroit Police Department Manual also sets forth a requirement that all police officers are “**considered to be on duty at all times**,” “24 hours a day,” must be able to make an off-duty arrest, and also must carry their gun, badge and identification while off-duty. (Attachment to Chief McKinnon’s First Affidavit, App. at 75a)

In 1965, the Michigan Law Enforcement Officers Training Council (MLEOTC) was created by statute to develop educational, mental and physical standards for all certified law enforcement officers of the state of Michigan. See M.C.L. §§ 28.601-616. The model of these requirements was developed by MLEOTC for all certified law enforcement officers and is called “the MLEOTC standards.” Based upon the MLEOTC standards, in 1995, the Detroit Police Department compiled a list of “24 Essential Job Functions of a Law Enforcement Officer” (hereinafter referred to as the “essential

functions” of the Detroit Police Department) (App. at 84a–85a). The essential functions include but are not limited to “pursuing suspects in foot chases, engaging in vehicle pursuit; effecting forcible arrests; overcoming violent resistance; and qualifying with a firearm.” (Id.)

The Chief of Police is responsible for overseeing the Detroit Police Department and protecting the public safety and its welfare. Every sworn member of the Department, regardless of individual duty assignment, is subject to being mobilized or recalled to perform patrol functions during a special event such as the Fourth of July Fireworks, Halloween Task Force or Detroit Grand Prix and during an emergency situation such as a riot or natural disaster. (Chief McKinnon, Second Affidavit at p.1, App. at 76a)

The Medical Section of the Detroit Police Department determines a police officer's fitness for duty, and accordingly, his or her duty status is based upon the evaluation of the Department's Physician. An officer who is temporarily unable to perform the full range of police duties, due to a duty or non-duty related medical condition, will be placed on “restricted duty” as determined by the Medical Section. The Detroit City Charter empowers the Chief of Police of the Detroit Police Department to request a non-duty disability retirement for a police officer once it is determined that the police officer is no longer capable of performing the essential functions of his position. (App. at 86a) In this regard, the Detroit City Charter provides:

On a written application to the Board of Trustees by or on behalf of a member or by the Head of his Department, a member, who becomes totally incapacitated for duty by reason of injury, illness or disease not resulting from the performance of duty, shall be retired by the Board of Trustees; provided, the Medical Director, after an examination of such member, shall certify to the Board of Trustees his total incapacity. If said

member was separated from service after the filing of the written application and had attained 25 years or more of service prior to the date of service, the Board of Trustee shall retire said member, under this part B. (As amended in November 5, 1968. In effect January 1, 1969) (Id.)

The Detroit Police Department makes every effort to return a member on restricted duty back to full duty. (Chief McKinnon's First Affidavit at p. 3, App. at 70a) However, when it is medically determined that a member has sustained an injury or suffered a disease which prohibits him from ever performing all of the essential functions of a police officer, that officer will be submitted for retirement. (Id.)

On January 3, 1972, Plaintiff Peden was hired as a police officer for the City of Detroit Police Department and was assigned to the Patrol Section of the Thirteenth Precinct. In February 1986, Mr. Peden filed an injury report claiming that he suffered a heart attack while doing clerical duties at the Thirteenth Precinct. (App. at 111a) The Police Department's Medical Section determined that Peden's injury was not duty related and therefore "noncompensable." (Id.) Thereafter, he was examined by his physician, Dr. R.H. Poling, and diagnosed with heart disease. (App. at 112a-116a) He subsequently underwent successful heart surgery. From 1986 until January 14, 1996, Plaintiff's own physician, Dr. Poling, recommended that Peden be placed on indefinite restricted duty due to his diagnosed heart disease. (Id.) The Medical Section concurred with Plaintiff's doctor's diagnosis and placed Peden on restricted duty. (App. at 117a-121a) Plaintiff was eventually assigned out on restricted duty to the Department's Crime Analysis Unit ("CAU") to perform clerical duties (App. at 122a) He was subsequently permanently assigned to a bidden for position in CAU. Following this assignment, the Department Physician, based upon an evaluation of Peden's medical condition, including his physician's reports and statements and recommendations,

concluded that Mr. Peden was permanently unable to perform all of the essential functions of a police officer. (App. at 123a)

The Department Physician submitted a recommendation on April 25, 1996 to the Board of Trustees of the Policemen and Firemen Retirement System pursuant to the Detroit City charter that Plaintiff be granted a non-duty disability retirement. (App. at 124a-134a) The Board of Trustees approved the Department's pension request for Plaintiff and he was retired effective August 22, 1997. Thereafter, Plaintiff filed the instant lawsuit, claiming that his involuntary retirement was discriminatorily based upon his disability in violation of the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA") and the Michigan Persons With Disabilities Civil Rights Act, M.C.L. § 37.1101 *et seq.*; MSA § 3.5501(101), *et seq.* (MPWDCRA"). The civil action was dismissed by the lower court pursuant to Defendant's Motion for Summary Disposition. The Court of Appeals reversed the lower court's decision on Plaintiff's appeal and Defendant filed an application for leave to appeal which was granted by this court.

SUMMARY OF THE ARGUMENT¹

The Court of Appeals erred in finding that Plaintiff-Appellee presented a genuine issue of fact as to the essential functions of his police officer position. Because the Detroit Police Department, unlike other industries, is a paramilitary organization, the Detroit Police Department's standards (the MLEOTC 24 essential functions), its policies, rules and regulations and its judgment should be controlling in determining the essential functions of a police officer.

¹ The Defendant-Appellant adopts by reference the arguments, legal authorities and analysis of its Application for Leave to Appeal in support of its Appeal brief as if fully set forth below.

The Court of Appeals also erred in finding that Plaintiff-Appellee presented a genuine issue of fact with respect to whether he could actually perform the essential functions of his position as a police officer with the Detroit Police Department. Plaintiff-Appellee's own treating physician and the Police Department physician concurred that Plaintiff was permanently unable to perform the physically strenuous aspects of police work and Plaintiff admitted the same. Consequently, the Court of Appeals' conclusion that a factual issue remained is simply inexplicable.

This appeal presents a significant issue of public interest as to whether police departments have the discretion to determine how they will allocate their resources, including police personnel, to carry out their primary mission of crime prevention. As will be demonstrated in the following argument, the Court of Appeals' decision was clearly erroneous and will substantially limit Defendant-Appellant's ability to fulfill its statutory obligation to ensure that its police officers are able to perform essential functions of a law enforcement officer. The grave errors made by the Court of Appeals in this decision can only be remedied by a complete reversal by this court.

STANDARD OF REVIEW

Appellate review of a motion for summary disposition is de novo. Summary disposition is proper when a complaint fails to state a claim upon which relief can be granted. MCR 2.116(C)(8). A motion for summary disposition under this rule tests the legal sufficiency of the claim only, and not whether there is any factual support for the claim. Hence, only the complaint is examined. Schenk v Mercury Marine Div Lowe Industries, 155 Mich. App. 20; 399 NW 2d 428 (1986). See also MCR 2.116(G)(5). Accordingly, a strict test is employed: the reviewing court must rely on the pleadings

alone, assuming that the factual allegations in the complaint are true along with any inferences that may be drawn from those facts, and dismissal is warranted only when a claim is so unenforceable as a matter of law, that no factual development could possibly justify a right to recovery. Kearney v Dep't of Mental Health, 168 Mich. App. 406; 425 NW 2d 161 (1988).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim. Marsh v Civil Service (aft Remand), 173 Mich. App. 72, 77; 433 NW 2d 820 (1988). "The party opposing the motion has the burden of showing that a genuine issue of material facts exists, and, in so doing, the opposing party may not rest upon mere allegations or denial in the pleading." Singal v GMC, 179 Mich. app. 497, 502; 447 NW 2d 152 (1989). "The benefit of any reasonable doubt is given to the party opposing the motion, and the court may only grant the motion if it is impossible for the claim or defense to be supported at trial because of a deficiency which cannot be overcome." Marsh, supra, 173 Mich. App. 73.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING THAT A GENUINE ISSUE OF FACT EXISTS REGARDING THE ESSENTIAL FUNCTIONS OF PLAINTIFF'S POSITION.

A. The Court of Appeals' finding runs counter to the policies, rules and regulations of not just the Detroit Police Department but every Police Department, big or small, and its ability to carry out its law enforcement function.

The Detroit Police Department is a multi-tasked organization which, at the time of this lawsuit, employed over 4000 police officers in various positions, all of whom are all required to perform patrol functions, regardless of their individual assignment within the

Police Department, unless they are temporarily unable to physically do so. The Court of Appeals' finding that a genuine issue of fact exists in this case as to the essential functions of Plaintiff's position is based upon Plaintiff's unfounded assertion that he held an "inside" versus an "outside", i.e., "patrol," position within the Detroit Police Department which did not routinely require "patrol work." Plaintiff's assertion is not only self-serving and unsupported, it also runs contrary to the policies, rules and regulations of the Detroit Police Department, its effectiveness and the flexibility needed to run an efficient and effective police operation.

The Court of Appeals' findings and conclusions are a misapplication of the law to the facts of this case. For the reasons more fully set forth below, the Court of Appeals' decision should be reversed and the lower court's opinion reinstated.

To recover under either the MPWDCRA or the ADA, a plaintiff must establish that he or she is a victim of intentional discrimination based upon a disability. Under the MPWDCRA, a plaintiff must prove the following elements: (1) that he is handicapped as defined in the MPWDCRA, (2) that his disability is unrelated to his ability to perform the essential functions of the position and (3) that he has been discriminated against in one of the ways set forth in the statute. Ashworth v Jefferson Screw, 176 Mich. App. 737; 440 NW 2d 101 (1989), citing Doman v Grosse Pointe Farms, 170 Mich. App. 536; 428 NW 2d 708 (1988).

The MPWDCRA affords a plaintiff no protection unless he can demonstrate that he is qualified under the Act. Moreover, the plaintiff has the burden of proving that he can perform all of the essential functions related to his employment despite his disability, with or without an accommodation. EEOC v Amego, Inc., 110 F3d 135 (CA 1,

1997). Similarly, the ADA only protects “qualified individuals with a disability.” It defines a qualified individual with a disability as “one who, with or without reasonable accommodation, can perform the essential functions of the job.” 42 U.S.C. § 12111(8). Essential functions are those that are based on more than a marginal relationship to the job at issue.” Guneratne v St. Mary’s Hospital, 943 F. Supp. 771 (SD TX, 1996). Finally, the “ADA does not require an employer to eliminate or reallocate essential job functions of a position in order to provide accommodations.” Id.

In determining what the essential functions of the plaintiff’s position are, the Court of Appeals looked at the EEOC Interpretative Guidelines factors. The employer’s judgment as to what functions are essential is entitled to weight. 29 CFR 1630.2(n)(3)(i). Written job descriptions, “the amount of time spent performing that function, consequences of not requiring the function, and the experience of incumbents are relevant in assessing whether a function is essential”. 29 CFR 1630.2(n)(ii-vii)

- 1. The Detroit Police Department, unlike other employers, is a paramilitary organization whose judgment and expertise regarding public safety requires substantial deference with regard to how the essential functions of a police officer are defined.**

Law enforcement is distinct from practically every other service and police work is uniquely different from just about every other occupation, with the exception of “soldier.” These distinctions are based upon the fact that a police department, unlike other employers, is a paramilitary organization with a law enforcement duty it must carry out. Like the military, the functioning of a police department is based upon trust, discipline, rules and regulations, loyalty, obedience and honor. Like the military, a police department has sworn members who are classified into ranks such as sergeant,

lieutenant, etc. In the U.S. Army, a soldier may serve a role or position other than combat, such as “recruiter.” However, the Army’s authority and discretion to activate that soldier for combat whenever the need arises is without question and is quintessential to the defense of our country’s national security.

Similarly, like the responsibilities that the national defense imposes on our armed forces, it can not be seriously debated that the preservation of the public’s safety and welfare imposes no less responsibility upon the nation’s local law enforcement agencies. The question raised before this court is monumental for the state’s law enforcement agencies: can a police department require an individual who was hired and holds the position of “police officer” to perform a forcible arrest, use a firearm, and perform other functions which have been determined by the police department to be the essential function of the position regardless of individual’s 9-5 assignment? What are the ramifications if it can not?

If a police department determines that all police officers within the department are needed to be deployed to address a crisis, the police department’s judgment to make such a decision requires the utmost deference. The Detroit Police Department’s determination that all police officers are required to be able to take police action, including making an arrest, is embodied in its regulations and policies. A police officer is considered to be on duty at all times, 24 hours a day, to carry his weapons on him at all times along with identification. (Attachment to Chief McKinnon’s First Affidavit, App. at 75a) The Detroit Police Department has exercised its judgment based upon its expertise in law enforcement in establishing these regulations and policies to best effectuate its mission of protecting the public’s safety.

The Michigan Supreme Court has recognized the difference between the law enforcement function performed by a police department and its police officers and other industries and their employees and emphasized this fact:

A policeman's very presence, whether actually performing a specified duty during assigned hours, or engaged in any other activity during off-duty hours, provides a trained person immediately available for enforcement purposes.

Policemen are required by department order to be armed at all times, and why is this? Simply because by such requirement they are no matter where they are or what they are doing, immediately prepared to perform their duties. The police force is a semi-military organization subject at all times to immediate mobilization, which distinguishes this type of employment from every other in the classified service. Detroit Police Officers Assoc. v City of Detroit, 405 Mich. 950 (1972).

The Detroit Police Department must be allowed to exercise its judgment, and the expertise that accompanies it, to determine the method and means of safeguarding the welfare of the City of Detroit and its citizens. To carry out this critical mission, the Department's Chief of Police must have the discretion to deploy some or all of his police officers no matter their assignment, whenever and wherever they are needed. With respect to another part of the criminal justice system, the Supreme Court observed that the day-to-day operations of an agency "are not susceptible of easy solutions" and administrators "therefore should be accorded wide-ranging deference in the adoption of policies and practices." Bell v Wolfish, 441 U.S. 520, 547 (1979). The Bell court continued: "[T]he administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our [criminal justice system] is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." Id. at 548.

Under the EEOC's guidelines, an employer's judgment is one of the factors weighed in defining the essential functions of the employee's job. However, given the public safety responsibility imposed upon a law enforcement employer, its judgment should be entitled to greater weight. The trial court recognized this in granting summary disposition, that the essential functions of the officer position are defined by the employer and not the employee. (Transcript pp. 2-5, App. 49a-52a) The Detroit Police Department has determined in its judgment that all of its police officers must be physically able to perform this critical function. As the very title implies, Michigan law imposes on law enforcement officers a duty owed to the public at large, to preserve the peace. Zavala v Zinser, 123 Mich. App. 352; 333 N.W. 2d 278 (1983). Categories such as "inside" versus "outside" or patrol versus non-patrol do not exist in the Detroit Police Department.

Indeed, Commander Michael Falvo testified about the inaccuracy of describing police work by the terms "inside" versus "outside":

Q: The other term of art we need to talk about is "inside work" versus "outside work" I mean, I think we need to come to an agreement as to how we are going to describe those two activities. There are – the definition of police officer very broad, multifaceted job description. Some duties are done inside, don't require great physical activity, other duties are done outside and require extreme physical activity. Correct? That's just a generalization?

A: It's an inaccurate generalization. I don't agree with it. I couldn't agree with it.

Q. I want to come to terms, when we talk about inside police work versus outside police work. Let's see if we can agree that when we say inside police work we are referring to police work of a nature where the individual is not required to effectuate a forcible arrest or engage in other physical – type activity.

A: Well, that's the problem with your characterization. **I cannot agree that there is any police officer anywhere in the Detroit Police Department whose job, even if on a day-to-day basis may be sitting behind a desk or doing something like that, that does not involve the responsibility [sic] effectuate a forceful arrest or to chase criminal or whatever. My experience is just to the contrary.** (Commander Falvo dep. at pp. 21-22, App. at p. 13a) (emphasis added)

2. A majority of courts have ruled in favor of the Detroit Police Department's definition of a "police officer" and the essential functions of the position.

The majority of the court decisions, both federal and state, rendered on the question what are the essential functions of a police officer favor the police departments' definition of a "police officer" and the duties of that position, rejecting the argument that the essential functions of a police officer are determined by individual assignment. The courts have followed the police departments' position even where the police officer claimed, as here, that the essential functions were not uniformly performed by all police officers alike.

In finding that the essential functions of a police officer include the physical aspects of law enforcement, such as, making a forcible arrest on and off duty, these authorities have relied upon several factors also evident in the case at bar which establish that: the police department requires all police officers to perform the physical law enforcement function, i.e., a forcible arrest, and that the function is reasonable, legitimate and necessary. The courts have also looked at the consequences of not requiring the performance of the law enforcement function prescribed by the police department on its mission to safeguard the public safety and whether the desired function has been uniformly applied.

The seminal case involving reasonable accommodation of a disabled law enforcement officer is Simon v St. Louis County, Mo., 563 F. Supp. 76 (1983), *aff'd* 735 F. 2d 1082 (CA 8, 1984) In that case, a police officer asserted that the St. Louis County Police Department failed to make him a reasonable accommodation in violation of the Rehabilitation Act of 1973, 505(b) as amended 29 U.S.C. § 794a, by terminating his employment as a police officer after he was rendered a paraplegic by a gunshot wound. The officer argued that the police department's policies that all police officers are subject to be transferred to all positions in the department and must be able to make a forceful arrest were not reasonable, legitimate or uniformly applied and therefore discriminatory. He also contended that the department had "desk officer" positions that he could perform.

In rejecting the plaintiff's claim the court noted:

There are indeed some positions in which forceful arrests are not likely to be made by the commissioned officers filling them. This, however, is not an appropriate standard by which to judge whether the forceful arrest requirement is reasonable, legitimate, and necessary. Certainly plaintiff would not contend that because, hypothetically, only two-thirds of the commissioned officers are likely to make forceful arrest in their present assignments, the number of commissioned officers would be reduced by two-thirds. **Moreover, plaintiff's argument ignores the fact that commissioned officers, notwithstanding their current position within the department, must always be able to effect a forceful arrest whenever the occasion arises. This includes times when the officers are not actually on-duty.** *Id.* at 79. (emphasis added)

The Simon court concluded that the department's forcible arrest and transfer policies were nationwide standards, reasonable and necessary to guarantee efficient police work. *Id.* The court also deemed the police officer's evidence that the arrest policy was not applied in all instances is insufficient to show that it was not uniformly applied. *Id.* at 78. In reaching its determination, the Simon court declined to substitute

its judgment for that of the St. Louis County Police's with regard to carrying out its law enforcement mission. In this regard, the court stated:

This Court is unwilling to second guess the decisions of those infinitely better versed in the intricacies of personnel planning, municipal finance, and law enforcement techniques who have set the staffing requirements for the St. Louis County Police Department. If this Court were to hold that the department's forceful arrest requirement was not reasonable, legitimate, and necessary as applied to those commissioned officers who are currently filling assignments in which they are likely to make forceful arrests, it would, in effect, slash the reserve strength of the department and curtail its ability to transfer its officers. All positions currently held by commissioned officers who are not likely to make forcible arrests would be open to those not able to effect such an arrest. Thus, the actual strength of the department would be significantly less than its authorized strength. The court declines to substitute its judgment for that of those who have set the staffing requirements for the department. Thus, the Court finds that defendants' forceful arrest requirement is reasonable, legitimate, and necessary for all commissioned officers in the department. *Id.* at 79-80. (emphasis added)

As the Simon court astutely recognized, failure to embrace the Detroit Police Department's definition and application of essential police functions could result in an unwarranted and unsafe reduction of the actual strength of the Detroit Police Department.

Perhaps for this reason, the majority of the authorities to consider the matter of the essential functions of a police officer have held that a police officer, regardless of his assignment, is required to perform the traditional duties of the position, which include running down a suspect and making a forcible arrest, in carrying out the fundamental law enforcement function to protect and serve. Specifically, in Champ v Baltimore, 884 F. Supp. 991 (D. Md 1995), *aff'd without published opinion*, 91 F.3d 129 (CA 4, 1996) (Fourth Circuit opinion reported at 1996 U.S. App. LEXIS 16417), the court upheld the district court's decision that a police officer restricted to light duty could not perform the

essential functions of his position. The plaintiff, a police officer, suffered a severe injury to his left arm in a 1976 motorcycle accident. He then performed light duty assignments for nearly sixteen years. However, in 1992, the police chief determined that budgetary restraints required that police officers who were unable to perform the duties of a police officer be removed.

As a result, plaintiff was placed on a disability retirement and later filed suit. The district court found that the essential functions of a police officer included the following: making a forcible arrest, driving a motor vehicle under emergency conditions, and using a firearm. Id. Moreover, the district court found that **“even when an officer is going to lunch or off-duty, that officer must be capable of responding 24 hours a day to any demand where their services are required.”** Id. Thereupon the district court held that light duty was not a reasonable accommodation because “[a]n accommodation is unreasonable if it requires elimination of an essential duty.” Id. at 999. Accordingly, the court granted summary judgment for the employer. See also, Gomez v American Bldg. Maintenance, 940 Supp. 255 (ND Cal, 1966) (holding that an employer is not required to make an accommodation for an individual who is not otherwise qualified).

The rationale applied by the Champ and Simon courts has been followed by the majority of the courts addressing the issue of what constitutes the essential functions of a police. In Santos v Port Authority of New York & New Jersey, 1995 WL 431336 (SD NY, 1995), the district court held that it was not a reasonable accommodation to allow a police officer with a disabling foot injury to work in a restricted duty capacity permanently. The court found with respect to essential functions that:

By definition, a police officer is hired to preserve law and order and to protect lives and property. The employer's essential job functions

description states that individual police officers may be asked to perform any combination of the following duties: patrol by foot or automobile; apprehend violators; direct traffic; operate tractors, towing equipment, and emergency equipment; enforce traffic regulations; and maintain records....

Although defendant's submission is not conclusive evidence of the essential functions of a police officer, the "typical duties listed... are functions that bear more than marginal relationship to the job at issue." These functions clearly strike at the heart of a police officer's job.

Id. at 5. (citations omitted) (emphasis added). The court then found with regard to reasonable accommodation that:

Plaintiff contends that many positions with the Port Authority do not require the performance of the full duties of a police officer. Plaintiff further argues that because strenuous physical activities are not demanded of every police officer position, these functions are not essential to the job and that "an assessment must be made of the essential functions of the position actually worked by plaintiff."

If the Court were to agree with the plaintiff's definition, the designation of a Port Authority employee as "police officer" would be meaningless.... Moreover, even if it is true that some positions are not likely to require physical endurance, this is not an appropriate standard by which to judge whether these functions are essential.

Id. at 7. (emphasis added). Consequently, the court held that a police officer who could only perform clerical duties could not perform essential police duties. See also, Yodice v Metropolitan Dade County, 4 A.D. Cases (BNA) 1384 (SD Fla, 1995) (holding that a police officer on light duty for three years and later terminated was not a "qualified individual" under the ADA because she could lose control of her weapon in a violent confrontation); Karbusicky v City of Park Ridge, 950 F. Supp. 878 (ND Ill, 1997) (holding that police officer with hearing loss endangered himself as well as other officer and citizens).

In Ensslin v Township of North Bergen, 275 N.J. Super. 352; 646 A.2d 452 (1994), the court upheld the dismissal of a police sergeant's handicap discrimination claim citing Simon. The court noted that the issues in Ensslin and Simon were essentially the same: "whether the ability to be able to effect a forcible arrest, render emergency aid, and be freely transferable to all positions in the police department are essential functions of the job in question." The court concluded that even though there were a number of positions requiring administrative and clerical duties the police department required and expected each officer, regardless of the officer's assignment, to be capable of responding to "emergency situations."

In Coski v City and County of Denver, by and through Denver Police Dept., 795 P.2d 1364, 1367-68 (Colo. App. 1990), the court held that neither fundamental alterations in the nature of a job nor the elimination of an essential job function are reasonable accommodations. The Coski court noted that the police departments had a policy that all police officers must be able to fire a weapon and to make a forceful arrest and carry a weapon at all times and held that waiving the weapon and forceful arrest requirement was not a reasonable accommodation. The Colorado court found that "if all of the officers with permanent duty injuries were retained on the force, the number of positions available for able-bodied officers would eventually be significantly reduced, thereby endangering public safety in an emergency that required full mobilization of the police force." Id. at 1368. Accordingly, the court concluded that waiver of the weapon-firing and forceful arrest requirement is not a reasonable accommodation. Id.

In Shoemaker v Pennsylvania Human Relations Commission, 160 Pa. Cmwlth 216, 634 A.2d 772 (1994) plaintiff suffered angina symptoms at work and was

diagnosed with coronary artery disease by his treating physician. The court also noted that the City was entitled, as in the case at bar, to rely on the plaintiff's treating physician's medical opinion that plaintiff's heart problem limited him to "in-office functions" and precluded him from engaging in confrontational situations." Id. at 222. The physician, upon releasing the plaintiff to return to work, recommended that he not perform functions that might involve confrontational situations because such stressful situations might precipitate a heart attack. Id. at 218. The police department terminated the plaintiff because he could not perform the functions of a police officer. The plaintiff claimed that he was entitled to perform only clerical work or a "light duty position based upon his work restrictions. The court held that the police department was not required to create "a new type of police officer position" with "new job duties" for a permanently disabled police officer. Id. at 220. In rejecting the plaintiff's claim, the court concluded, in part, because the essential function of a police officer is to apprehend criminals, his physical limitations made reasonable accommodation "impossible."

In Molloy v City of Bellevue, 71 Wash. App. 382, 859 P.2d 613 (1993) the Washington Court of Appeals upheld a police department's decision to terminate a permanently disabled police officer concluding that "the policy reasons behind the Bellevue Police Department's rule, [that all police officers must be able to perform all duties of a police officer] ... and the 'forceful arrest' in Coski are identical: All officers must be able to perform all the duties of a police officer in order to carry out an officer's essential function of protecting the public and preserving the public peace." Id. at 618.

In Matos v City of Phoenix, 176 Ariz. 125, 859 P.2d 748 (1993) the court ruled that the police department was not required to accommodate handicapped police

officers by fundamentally altering the nature of the police officer position by eliminating one or more of the essential functions of the job. The court concluded that the essential functions of the position that the officers were hired to do, to preserve the peace, was controlling:

The undisputed facts here demonstrate that the primary function of the city's police officers is to protect the life and property of its inhabitants and to take whatever actions are necessary to do so. These include patrol duty, investigating crimes, arresting individuals accused of violating the law, participating in crowd and riot control, and instituting procedures in emergency situations involving the threatened or actual loss of property and life. To meet its needs, the city requires that its officers be able to make a forceful arrest. This requirement applies even to officers regularly filling desk assignments because those officers constitute the police department's reserve strength. That all police officers in the department must be able to make a forceful arrest has been found to be a national standard' and 'reasonable, legitimate and necessary to guarantee effective police work....Id., quoting Simon, 735 F. 2d at 1084. "

In Davol v Webb, 943 F. Supp. 1289 (D Colo. 1996), the court held that a police officer could not differentiate between the essential functions of patrol and non-patrol officer to create an issue of fact under the ADA.

In Wilson v New Orleans Police Department, 804 So.2d 838, 2000-2484 (La. App. 4 Cir. 12/19/01), the Louisiana Court of Appeals upheld a civil service commission's findings upholding the retirement of a police officer by the New Orleans Police Department because it declined to give him a permanent light duty assignment. The New Orleans Police Department had a policy of allowing police officers to work in limited duty assignments until they were able to come back to full duty and be transferred back to their original assignments. The department's chief testified that there were no permanent limited duty positions and that all officers must be capable of performing 100% of the requirements of a police officer. Id. Under the limited duty

policy, once it is determined by the officer's treating physician that he or she will never be able to return to full duty, a pre-termination hearing is held and the officer is given the option of retiring or dismissal or seeking other accommodations in City employment. Id.

The plaintiff injured his back, admitted that he was unable to return to full duty, his injury was certified by his doctor as permanent and he chose to retire. Plaintiff claimed that his forced retirement was in violation of the ADA and Louisiana discrimination laws because he was fully and completely performing the duties of his present assignment. In denying the plaintiff's discrimination claim, the court relied on Simon and Champ and determined that the New Orleans Police Department had a legitimate need to be staffed with able-bodied officers and that its limited duty policy of removing permanently disabled officers was justified and that its decision not to establish permanent limited duty positions was justified by the needs of the department. Id. Should the court follow Plaintiff's position in this case, the Detroit Police Department would be unable to require any desk officer to perform an off-duty arrest.

The federal courts have also recognized that the essential functions of a position are not changed just because a police officer has not performed those functions for a substantial period of time. In Holbrook v City of Alpharetta, Ga, 112 F. 3d 1522 (CA 10, 1970), a police officer was on light duty for four years before being terminated. He then filed suit under the ADA. The court considered the police officer's record of light duty assignment and held the following:

In this case there appears to be little doubt that, for quite some time and perhaps with relatively minor disruption or inconvenience, the City of Alpharetta was able to accommodate Holbrook, with respect to those essential functions he conceded he cannot perform without assistance. It is equally apparent however, that the City of Alpharetta's previous accommodation may have exceeded that which the law requires. We do

not seek to discourage other employers from undertaking the kinds of accommodations of a disabled employee as those performed by the city of Alpharetta in Holbrook's case; indeed, it seems likely that the city retained a productive and highly competent employee based on its willingness to make such accommodations. However, we cannot say that the City's decision to cease making those accommodations that pertain to the essential functions of Holbrook's job was violative of the ADA.

Id. at 1528. In other words, the fact that an employee performs light duties for a period of time does not alter the essential functions of a police officer position.

The Holbrook holding is consistent with the district court's holding in Hill v Harper, 6 F. Supp. 2d 540 (ED Va, 1998) that the essential functions of a police officer are defined at the date of hire and not at some later date during a police officer's career. In Hill, the court determined that even the job of a deputy sheriff with limited mobility, located in the control room for three years without inmate contact, "is a position carrying with it all of the responsibilities of a deputy sheriff." The district court rejected the plaintiff's argument that Sheriff Harper could have reasonably accommodated this disability by placing him in the control room on a permanent basis. The court held the following:

Hill points to the fact that Sheriff Harper, through one of his agents, did just that for three years before his resignation. However, because this accommodation effectively eliminated the "essential functions" of being able to rotate through the various duty posts, the Court finds that it does not constitute a "reasonable accommodation." **Thus, irrespective of the length of time Hill previously worked in the control room, Sheriff Harper was not required to continue this accommodation.** See, e.g., Champ, supra.

(Id. at 544) (citations to record omitted) (emphasis added) Thus, the district court did not accept the argument that the control room job was a different job of a deputy sheriff for purposes of the ADA.

Moreover, the court held that it is the duties of the job at the date of hire that determine the essential functions and not the job at the time of separation in a law enforcement context. *Compare Taylor v Garrett*, 820 F. Supp. 933 (ED Pa, 1993), *aff'd without opinion*, 136 F. 3d 1331 (CA 11, 1998). Finally, it held that although an employee has held a particular “light duty” type position for a long period, this has no bearing on the essential functions or reasonable accommodation analysis.

As in Hill, all Detroit police officers, unless they are restricted duty officers who are by definition physically unable to perform full duty work, are assigned to do periodic patrol work at special events such as the Fourth of July fireworks, Thanksgiving Day Parade, and Halloween Task Force, (wherein the Chief of Police mobilizes the Detroit Police Department to combat arsonists in the City of Detroit on the night before Halloween). Like Hill, Plaintiff’s handicap discrimination claim should be adjudged by the essential functions of his [police officer] position at the date of hire and not at the time he was separated from the Detroit Police Department. Given the decisions in Hill and Holbrook, the Detroit Police Department’s decision to retire Plaintiff based upon competent medical evidence that he could no longer perform the essential functions of his police officer position that he was hired into does not constitute a violation of the ADA or MPWDCRA. Accordingly, the Police Department’s decision to retire Plaintiff was based upon legitimate non-discriminatory reasons. If a police officer is not required to take police action due to his individual assignment, the Police Department’s off-duty arrest policy would be meaningless.

Plaintiff claims that Dorris v City of Kentwood, 1994 WL 762219 (WD Mich, 1994) and Tower v City of Detroit Police Department, 96-CV73369 control the outcome of this

case. In this regard, Plaintiff claims that he was in a position similar to the D.A.R.E. position in Dorris which did not require strenuous physical activity on a regular basis. The Dorris court decided that the essential functions analysis is determined by the position the person held at termination. The Tower court reached a similar conclusion as the Dorris court but admitted that its finding of a genuine issue of fact as to the essential functions of a police officer was “controversial.” It is undisputed, however, that the Dorris and Tower courts followed the minority view of courts which have addressed the issue of what constitutes the essential functions of a police officer.

Plaintiff’s position as adopted by the Court of Appeals is based upon a false premise that “one size fits all” with regard to the essential function analysis in handicap discrimination cases. Plaintiff argues that because his regular CAU assignment does not require him to take police action, the Police Department can not require him to do so under the ADA and MPWDCRA. This argument runs counter to the majority of the authorities cited above that recognize that the inherent nature of police work imposes nationwide standards on police officers, unlike any other occupation, to take police action whenever needed. They recognize that a police officer is a police officer 24 hours a day to ensure public safety.

Plaintiff’s reliance on cases like Sharp v Abate, 887 F. Supp. 695 (S.D.N.Y. 1995) is misplaced because that case involved a correctional officer. Unlike police officers, off-duty correctional officers do not have arrest powers nor are they required to make arrests. Plaintiff also relies on Kuntz v City of New Haven, 1993 WL 276945 (D. Conn.), *aff’d* F. 3d 622 (CA 2, 1993), *cert. den.*, 115 SCt 667 (1994) wherein a police department refused to promote a police sergeant with heart disease to lieutenant

because of his light duty status. While the Kuntz court ruled in favor of plaintiff sergeant's claim of handicap discrimination, the Kuntz case is clearly distinguishable from the instant case. The Kuntz court noted the differences between position description for police officer and lieutenant "which unlike the job description for police officer, there is no specific mention of danger, thus clearly reflecting that the role of a lieutenant is more supervisory in nature than subordinate roles."

Plaintiff suggests that the police function is not essential to his position because the Police Department has restricted duty police officers who are not required to take police action and it does not periodically test its officers' ability to determine whether they can perform the function. Plaintiff's argument is unfounded. The Police Department does not require restricted duty officers to perform the physical requirements of the job because they are unable to do so. For that reason, restricted duty is only permissible as a temporary, not a permanent, condition. The Police Department policies require that all officers who are not on temporary desk duty to be physically able to perform the full range of police duties. Plaintiff has not produced any evidence of a full duty officer who is unable to perform the Department's stated essential duties of his job. Furthermore, the Champ Court determined that the police function was essential notwithstanding the fact that it was not performed by all police officers. (Champ, 884 F. Supp., 991 at 1000)

Plaintiff's argument regarding restricted duty officers contravenes the Department's restricted duty policy and its purpose. The Department has determined in its judgment that restricted duty is a temporary measure to afford injured officers to return to full duty and restricted duty officers do in fact return to full duty. Only when the

Detroit Police Department has medically determined that the officer is permanently incapable of performing full duty work is the decision made to retire him. Plaintiff's argument is nothing more than a disincentive to the Police Department to continue a policy which inures to the benefit of not only the disabled police officer but the Department as well. Restricted duty policy also encourages injured officers to self-report injuries.

Plaintiff also claims that the Detroit Police Department has classified some of its police officers as "permanent restricted duty" which implies that permanent light duty positions exist. As Commander Falvo testified, "there is no such thing as 'permanent restricted duty' in the Detroit Police Department." (Commander Falvo dep. at p. 26, App. at 14a) The term was used only to inform a restricted duty officer that he should report back to the Medical Section for a medical evaluation in six (6) months instead of the more typical one-month intervals. (Id.)

Plaintiff has the luxury of looking at this case and the essential functions argument only as it pertains to him. The Detroit Police Department has no such luxury. It must look at this case globally; it must determine how an adverse decision from the Court affects not only Mr. Peden but the other 'desk officers.'" It must consider how an adverse ruling by this Court would affect the how it runs its operations based upon the predicate that all police officers within the Department, regardless of assignment, are required to take police action unless they are physically unable to do so at that time.

The Detroit Police Department's policies and regulations reflect the same policies as those found in Simon, Champ, and their progeny. The Detroit Police Department, by its rules and regulations and a position description, requires all police officers to be able

to make a forcible arrest and be armed at all times. These law enforcement requirements and responsibilities have been delineated and reinforced by the Department's MLEOTC standards. These requirements are indeed nation-wide standards which are uniformly applied to all police officers despite their individual assignment, notwithstanding the fact that the Department has police officers who are excused from performing the physical aspects of the essential functions pursuant to the Department's restricted duty policy because they are temporarily unable to do so. The Department's forcible arrest requirement for all of its police officers is necessary to ensure its ability to maintain its actual strength and efficiently carry out its law enforcement mission. Requiring all police officers, as the Detroit Police Department does, to make a forcible arrest is an undeniably reasonable measure to accomplish this mission. Enforcing Departmental requirements which, as here, apply to all police officers, regardless of their individual assignment, is also a legitimate means of protecting the public's welfare.

The police department in Champ and those in some of the other cases noted above possess a policy of transferring or rotating police officers, which required all officers to be capable of taking police action. The Detroit Police Department's special events policy is not a transfer policy but requires all police officers, regardless of their assignment, to work Fourth of July Fireworks, Halloween Task Force on Devil's Night, etc. on a rotational basis. Like a transfer policy, the special events policy also requires that police officers whose day-to-day duty assignment may not require them to shoot a gun or make an arrest must be able to perform these functions if the need arises. Accordingly, both policies serve a common critical interest, safeguarding the public's

welfare. Additionally, the Police Department has the right under the DPOA collective bargaining agreement to “assign out” a police officer for up to 84 days from his regular duty assignment when in its judgment it is necessary to do so. Plaintiff has adduced no evidence that the requirement to make an off-duty arrest does not exist or is not enforced. Plaintiff cannot create a genuine issue of material fact to defeat a properly granted motion for summary disposition based upon conclusionary self-serving allegations. Consequently, the Court of Appeals erred in finding that Plaintiff had created an issue of fact as to the essential functions of his police officer position.

II. THE COURT OF APPEALS’ FINDING IS CONTRARY TO STATE LAWS WHICH IMPOSE LAW ENFORCEMENT DUTIES ON ALL POLICE OFFICERS

Notwithstanding that this case raises a novel issue regarding the essential functions of a police officer, the requirement that all police officers perform law enforcement duties imposed by state law has been addressed by this Court and the Sixth Circuit Court of Appeals. White v Beasley, 453 Mich. 308, 552 NW 2d 1 (1996), provides support for Defendant-Appellant’s position regarding the “essentialness” of the traditional police functions for all Detroit police officers.

In its rationale regarding the interpretation of M.C.L. § 92.4 (Fourth Class Cities; Duties of Police Officers) and its applicability to the City of Detroit, Justice Levin in dissent cited this statute and the City of Detroit Charter in concluding that “[t]he police have a duty under state law and the Charter of the city of Detroit to protect the public and to perform their jobs with due care. These legislative pronouncements state a police officer’s duty in mandatory terms.” Id. at 308, 552 NW 2d at 19 (J. Levin, dissenting).

The lead opinion by Chief Justice Brickley did not disagree with the pertinence of M.C.L.A. § 92.4 regarding to the scope of statutorily imposed law enforcement duties on Detroit police officers. Id. at 323, 552 N.W. 2d at 6. (“It is in this sense that M.C.L. § 92.4; MSA § 5.1752 enumerates the tasks and powers assigned to police officers. The legislature never intended M.C.L.A. § 92.4; MSA § 5.1752 to impose a duty in tort.”)²

The Sixth Circuit has also held that where a statute imposes a particular obligation or duty upon a class of employees, “the determination of ‘essentialness’... is properly a matter of law.” Brickers v Cleveland Board of Education, 145 F.3d 846, 849 (CA 6, 1998). Additionally, the court relied on Murphy v United Parcel Service, Inc., 946 F. Supp 872, 882-83 (D Kan, 1988) *aff’d*, 141 F.3d 1185 (CA 10, 1993), *petition for cert. filed*, 66 USLW 3027 (U.S. June 9, 1998) (No. 97-1992), *aff’d* 527 U.S. 516, 144 L.Ed 484 (1999) that “[t]he ADA does not require an employer to accommodate a person’s disability by ignoring the duties imposed by law.”) The Brickers court concluded that “[t]herefore, a legally–defined job qualification is by its very nature an essential function under 42 U.S.C. §11211(8), irrespective of whether the employer adhered to that requirement in all cases.” *citing Myers v Hose*, 50 F.3d 278, 284 (CA 4, 1995).

The Brickers’ court also noted in reaching its holding that a school bus attendant must comply with a state mandate lifting requirement, stating that “[m]uch like a police officer [who] must have the skill required to use a firearm yet might never actually draw

² A number of Michigan statutes impose a duty to make an arrest or use police powers on all Detroit police officers, without exception, such as M.L.C.A. § 750.52 (Duty of public officers); M.C.L.A. § 764.1b (Duty of peace officers to make arrest pursuant to arrest warrants); M.C.L.A. § 479.13 (Duty of peace officer to arrest for violation of Motor Carrier Act); M.C.L.A. § 772.13a (1988 Supp.) (Duty of peace officer to arrest person for violating terms of recognizance in peace bond); and M.C.L.A. § 765.26 (Duty of peace of officer to assist surety in recovering person on bail).

his or her weapon, it only stands to reason that a bus attendant charged with the supervision and care of a group of children with peculiar needs and limitations would be able to account for those needs and limitations in any foreseeable circumstances, regardless of whether that circumstance actually arises.” (Id.)

Michigan imposes a duty to perform a police action,--a law enforcement function, under the force of law on all police officers of the state. A decision by this Court that Plaintiff is not required to perform a law enforcement function would run afoul of the aforementioned Michigan statutes as well as the Department’s arrest requirement for all of its police officers, including those who work in the CAU.

The Court of Appeals also erred in concluding that Plaintiff presented evidence raising a genuine issue of material fact regarding whether the MLEOTC model functions are in practice, essential functions of his CAU position. (Opinion at p. 5, App. at 67a). Defendant provided the court with the affidavits of three CAU officers who testified that all of the full duty CAU officers are required to perform the arrest /patrol function for special events and the only reason that Plaintiff was not required to perform the patrol function was due to his medical condition.³ The court’s conclusion that not all officers assigned to the CAU participated in special patrols (referred to as “special events” by the Detroit Police Department) and that such patrols were infrequent is erroneously based upon only two officers, Peden and Glenn Corker, another restricted duty officer who like Peden was excused from performing the special patrols because he was physically unable to do so and not because the Detroit Police Department did not uniformly require them. It should also be noted that the Department sought Officer

³ See Affidavits of CAU Officers Kilgore, Huffman and Boone (App. at 135a-143a)

Corkers' retirement, as well as Peden's retirement, for his inability to perform the essential function of the job. (Inspector Weide deposition at pp. 47-50, App. at 144a-148a). Given the record evidence, the CAU police officers are required to perform patrol work on occasion unless they are physically unable to do so as determined under the Department's restricted duty policy. Contrary to Plaintiff's assertion and the Court of Appeals' finding, the Detroit Police Department's arrest requirement applies to, as it does to all Detroit police officers, those officers whose regular duty assignment is in the CAU.

III. THE COURT OF APPEALS ALSO ERRED IN ITS ASSESSMENT OF THE EEOC FACTORS REGARDING THE AMOUNT OF TIME SPENT PERFORMING THE PATROL FUNCTION AND THE CONSEQUENCES IF THE FUNCTION IS NOT PERFORMED AND ITS FINDING IS CONTRARY TO POLICY AND PREVAILING LAW.

The Court of Appeals' conclusion that Plaintiff's CAU position was the relevant position for the essential function analysis was based upon its findings that not all police officers assigned to the CAU participated in special events patrol and such patrols were infrequent. In other words, the court determined that because Plaintiff did not spend "X" amount of time performing the "patrol function" of his police officer position, the duties of his CAU which he routinely performed were controlling.

In essence, in its analysis of the police officer position, the Court of Appeals did exactly what Plaintiff's and amicus Michigan Trial Lawyers Association suggested. That is, in a handicap discrimination case, the police department should be treated just like any other public service employer. They have suggested that because other disabled employees were allowed to remain on restricted duty such as Officer Zimmerman who

was wheel-chaired bound, the Department does not uniformly enforce the 24 essential functions.

At first blush, their argument sounds inherently fair. Why should this court treat one employer differently than another? Normally, one might not have grounds to squabble with a finding regarding the position to apply the essential function analysis. However, this is not the normal handicap discrimination case because the employer involved is a police department and the issue is whether it has the right to require its police officers to be ready and able to perform the law enforcement function that they swore to take.

In a handicap discrimination claim involving the essential functions of a police officer position, regardless of his individual duty assignment, there can be but one correct position. Because the critical issue in determining the essential functions of police officer is not how much time the individual performs the law enforcement function, but whether he can perform the function, if necessary, the Court of Appeals' decision widely misses the mark. The critical issue in the essential analysis of a function related to the public's safety is the potential of harm to the public if the function is not exercised.

Fortunately, the courts have recognized that in the application of law, there is a difference between an organization charged with performing a public service, such as law enforcement, and other industries. They have recognized that the responsibility for the public safety is not the same as that for making cars or other manufacturing, or even the services performed by another public service organization such as trash pick-up. A plant worker who is not able to make a widget or a sanitation worker who is not able to pick up trash will not have a disastrous effect on the public safety. The same can not be

said of the consequences of a police officer not required to make an arrest or take other police action should the need arise. All police officers, and even desk officers, go to lunch at one time or another. Should Plaintiff be in a bank on his lunch break during an attempted robbery, under Plaintiff's view of his essential functions, he is not required to take police action. Literally, the potential exists that a crime could occur in the presence of a police officer at any time, on duty or off, which would require the officer to be capable of rendering police assistance to the public.

The frequency of performing a given job function, which was the basis of the Court of Appeals' finding, is not relevant to an essential function inquiry regarding a function related to the public's safety. In Dauten v County of Muskegon, 128 Mich. App. 435; 340 N.W.2d 117 (1983), the Michigan Court of Appeals upheld summary disposition of a denial of a position of lifeguard to a plaintiff based upon the potential for injury to the applicant-plaintiff and the public related to the applicant's ability to perform the duties of a lifeguard. The court determined that "even if a lifeguard never has to attempt to save a life, her ability to do so is still the most important factor to be considered in making a decision to hire." Id. A physically determinable characteristic which may disable a lifeguard in a life saving situation is a handicap that is related to the applicant's ability to perform the duties of a particular job." Id. The Dauten court's holding is supported by Brickers in that it is relevant that the need to perform a function that involves the public's welfare may arise in any foreseeable circumstance, 'regardless of whether that circumstance actually arises.' Brickers, supra.

The same holding expressed by the Dauten court regarding the proper analysis of essential functions that involves the public's interest has been applied in a law

enforcement context by the Colorado Court of Appeals in Coski, 795 P.2d 1364. Coski court held that the fact that some police officers do not fire a weapon or effect a forceful arrest on a regular basis is not the appropriate standard for judging the essential functions of a particular position. Coski, supra at 1367. The court found that:

Police officers can expect to encounter force and violence daily in the performance of their jobs. Coski's condition itself is indicative of some of the dangers inherent in police work. Police officers must be able to take action to uphold their sworn duty to preserve the peace, protect life and property, and prevent crime. The infrequency with which a particular officer fires a gun or makes an arrest in furtherance of her duty does not eliminate the need to be capable of performing that duty. Thus, we conclude that the ability to fire a weapon and to make a forceful arrest is an essential job function because it is reasonable to require this of all police officers.

Id. The Coski court further concluded that "[a] police officer who cannot fire a weapon or make a forceful arrest is a danger to herself, other officers, and the public." Id. at 1368.

The Detroit Police Department's policies, such as being on duty and armed at all times, recognize that a police officer must be prepared that an emergency or other crisis may occur at any time and anywhere. The Department's off-duty arrest requirement recognizes its need to be able to confront this threat. The necessity of a massive police mobilization is more than a mere possibility today. September 11th has forever changed the state of preparedness for a terrorist attack in America by local and national governments alike. Should Plaintiff's position be adopted by this court, the Detroit Police Department could not mobilize its entire police force, if the need arose, to respond to another terrorist attack. Under Plaintiff's "doctrine", the Police Department also could not require the CAU officers to assist during special events like the Halloween Task Force on Devil's Night, which it now does. Clearly, with respect to any

future terrorist event, all police officers could be called upon or mobilized to take police action not only in the state of Michigan. Should a terrorist attack occur in another state, the members of Detroit police force might be needed in that state which might also require a mobilization of officers who normally sit behind desks to perform the patrol function. National emergencies, and especially a terrorist attack, require that a police department be able to mobilize its force in the manner in which it deems best suited to address or combat the potential threat based upon the policies it has drawn up to deal with the same. Being able to require a police officer to respond to a call for assistance to a national crisis is no longer a hypothetical situation. Not only will a police department's performance of its law enforcement functions be severely weakened by Plaintiff's position, the policies behind the function and its mission may be eviscerated. Nothing under the restricted duty policy would prevent an officer from taking police action under the worst circumstances of a terrorist attack if he was absolutely needed for the purposes of law enforcement.

Clearly, the majority of the courts which have considered the question as to what are the essential functions of a police officer have concluded that the frequency of performing a given function requiring an officer to take police action is not a determinative factor in their analysis. Rather, the authorities strongly suggest that the adverse consequences that might result if such a law enforcement function were not required should be given significant weight in the essential function analysis in favor of the police department's position that the function is essential.

IV. THE COURT OF APPEALS ERRED IN FINDING THAT PLAINTIFF – APPELLEE PRESENTED A GENUINE ISSUE OF FACT AS TO WHETHER HE COULD ACTUALLY PERFORM THE ESSENTIAL FUNCTION OF HIS POSITION AS A POLICE OFFICER WITH THE DETROIT POLICE DEPARTMENT.

The Michigan Court of Appeals also improperly credited Plaintiff's assertion that he pursued a suspect on foot and made arrest while on restricted duty. On this basis the Court concluded that Plaintiff had created genuine issue of fact of whether or not his disability prevent him from performing the particular functions of a police officer at issue in this case. The courts have been reluctant to credit unsupported self-serving assertions by a plaintiff about his physical condition particularly where there is medical evidence to the contrary. In a similar case where the plaintiff police officer suffered from ulcerative colitis, the court affirmed the grant of defendants' motion for summary disposition holding:

Plaintiff cannot salvage his claim with his bald assertion of a belief that he was able to work at the time unsupported by any medical or other objective evidence.

Mazza v Bratton, 108 F. Supp. 2d 167 (E.D. N.Y. 2000); 2001 WL 363513. Even assuming that Plaintiff in the instant case did on an occasion make a forcible arrest, this evidence hardly creates an issue of fact contrary to the overwhelming medical evidence in this case. That evidence included diagnoses from his own physician which, together with the diagnoses of other examining physicians, formed the basis for a sound and legitimate decision by the Detroit Police Department's physician to retire him. That medical evidence was the basis for the Detroit Police Department's uncontroverted conclusion that Plaintiff's heart condition rendered him permanently unable to perform the essential functions without subjecting himself to an unacceptable health risk.

Plaintiff suffered a heart attack in 1986 and exhibited all of the classic coronary risk factors: high blood pressure, cigarette smoker and a family history (father died of a heart attack). (App. at 111a, 124a-134a)

From the date of his heart attack up to the date of his termination, almost ten years, Plaintiff's own physician recommended that he be carried on indefinite restricted duty. (App. at 112a-116a, 124a-134a) With this accumulated medical evidence against him, Plaintiff, merely for the purposes of defending his lawsuit, now claims that he can perform the essential functions of a police officer. Strangely, Plaintiff never made this assertion before he was retired; the motivation behind his present posture cannot be mistaken.

Plaintiff suggests to this Court that no individualized assessment was made of his ability to perform the essential functions as if it were fact. As the familiar adage goes, "why let the facts get in the way of a good story," so goes Plaintiff's argument. Plaintiff's medical file which is summed up by the Department letter seeking his retirement fully substantiates the medical assessments and examination that were made throughout the years. These examinations and the resulting diagnoses, including those of his own treating physician, were sufficient to put Plaintiff on restricted duty to which he did not object. Perhaps, it would have satisfied Plaintiff if the Department, knowing that he had heart disease and had suffered one heart attack, put him through some physically strenuous tests to determine what they had already learned through his medical history. Plaintiff's medical history established that he should not perform any physical activities in his position. The fact that the Police Department continued to have Plaintiff report to

the Medical Section for periodic evaluation only reinforces their commitment to return him to full duty.

Plaintiff has failed to produce one doctor at the time of this litigation or before who was willing to state that Plaintiff was not be at risk in performing the essential functions of a police officer! Plaintiff relies on a May 22, 1986 medical examination by Dr. Robert Gerisch which is inconsequential at best when weighed against its content and Plaintiff's medical history of heart disease diagnoses. Plaintiff states that Dr. Gerisch's finding that Plaintiff "could do any work he wanted" as evidence that he could perform all aspects of police work. (App. at 149a-155a) However, Dr. Gerisch noted particularly that Plaintiff was not performing patrol work at the time of his examination. Id. Dr. Gerisch also diagnosed Plaintiff as suffering from "possible early artiosclerotic heart disease." (App. at 154a) Moreover, Plaintiff's counsel was specifically asked by Judge Giovan whether Plaintiff was asserting that he could perform the patrol function. (App. at 21a) Plaintiff's counsel replied that while Plaintiff could perform the duties of his CAU position, he could not perform a patrol function because it "would take a lot of physical endurance." (Id.)

CONCLUSION

Contrary to the Court of Appeals' finding, Plaintiff has not established a genuine issue as to the essential functions of his police officer position. The courts have accorded the judgment of a police department, as a paramilitary organization, great deference in defining the essential functions of a police officer. Requiring all Detroit police officers, regardless of their individual assignment, to be able to take police action, whether on or off duty, is a reasonable, legitimate and necessary measure to protect the

public safety as established by this record. Also, the Department's requirements and policies, its position description and MLEOTC standards all impose a duty on all Detroit police officers to be capable of responding to the public's need whenever and wherever necessary. Michigan laws also impose a duty on all law enforcement officers of the state to be able to carry out a law enforcement function, including making an arrest.

How often a police officer is called upon to make an arrest is not, contrary to the Court of Appeals' finding, a relevant factor in the analysis of the essential functions of a police officer. The important factor to be considered in determining the "essentialness" of a function that is related to public's safety, as here, is whether a "foreseeable circumstance" may arise which requires that the function is performed. It is foreseeable that a police officer who regularly works behind a desk may be called upon to take police action at any time, on duty or off.

The Department's arrest requirement is an essential function of the CAU officer position as well. The record evidence shows that CAU officers are required to participate in special events which require the performance of the patrol function and that only CAU officers, Plaintiff and Glenn Corker, have not been required to participate in the special events because they are physically unable to do so. The Court of Appeals erred in finding otherwise.

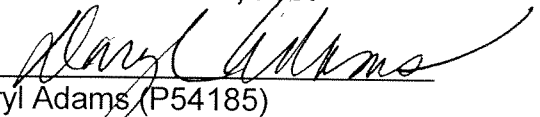
Finally, the Court of Appeals erred in determining that a genuine issue of fact exists with regard to whether Plaintiff could perform the physical aspects of a police officer. His self-serving bald assertions are insufficient to create an issue of fact as to his ability to perform the Department defined essential functions of a police officer

where, as here, the resounding medical evidence, including the diagnosis of his treating physician, is to the contrary.

For the reasons stated above, Plaintiff is not "qualified" under either the ADA or the MPWDCRA, and therefore, the Court of Appeals' opinion should be reversed and the lower court's decision should be reinstated.

Respectfully submitted,

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